IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2440 OF 2004

Shri. Ajay Ganpatrao Kadve ...Petitioner

Vs.

Sau. Lalita Ajay Kadve & Ors. ...Respondents

Ms Manda Loke i/by Shriram S. Kulkarni for the Petitioner.
Mr. P. N. Joshi for the Respondent No.1.
Mr. A. S. Gadkari A.P.P. for the Respondent No.2.

CORAM : A. S. OKA, J.
DATED : JULY 12, 2005.

P.C.:

1. Rule. The Respondents waive service. Taken up for hearing by consent of the parties.

2. Heard Counsel appearing for the partie. By this Petition under Article 227 of the Constitution of India, the challenge is to the judgment and order dated 06th October, 2004 passed by the learned Additional Sessions Judge as well as the order dated 18th December, 2002 passed by the learned Judicial Magistrate First Class. The challenge also is to one more order dated 28th October, 2003 passed by the learned Judicial Magistrate.

3. On Application made by the Respondent No.1-wife under section 125 of the Code of Criminal

Procedure, 1973, an order for payment of monthly maintenance was passed in favour of the Respondent No.1 and as to today, said order has attended finality. It appears that the Petitioner did not comply with the said order by depositing the requisite amount of monthly maintenance. Monthly maintenance awarded was at the rate of Rs.500/- from the date of filing of the original application till 30th April, 1999 and at the rate of Rs.1,200/- from 1st May, 1999 onwards. Therefore, a recovery application was filed by the Respondent No.1. On the said recovery application an order was passed on 18th December, 2002 directing simple imprisonment of the Petitioner for a period of one month. The said order was passed obviously on the basis of the default committed by the Petitioner up to the date of the order and the arrears of maintenance as of that date was a sum of Rs.26,800/-.

4. Subsequently, an application was filed by the Petitioner praying for modification of the original order passed under section 125 of the said Code. In the said Application No.38 of 2003 an application was taken out at Exh.4 for staying the proceedings of the recovery application filed by the Respondent No.1. One more application was filed at Exh.6 in the

Application No.38 of 2003 seeking directions to send the Respondent No.1 for medical examination. By order dated 28th October, 2003, the learned Chief Judicial Magistrate rejected the Applications at Exh.4 and Exh.6. In the meanwhile a Revision Application was preferred by the Petitioner for challenging the order dated 18th December, 2002 passed in the recovery application. The said Revision Application came to be rejected by the impugned judgment and order dated 6th October, 2004.

5. The learned Counsel appearing for the Petitioner submitted that the Petitioner has no means to pay as reflected from the report of the Bailiff and panchnama. Relying upon a decision of the Division Bench of this Court reported in 1992 Maharashtra Law Journal,198 (Dnyaneshwar Baburao Gorel Vs. Kamal Dnyaneshwar Gorel), she submitted that the order passed by the learned Magistrate sentencing the Petitioner to undergo the simple imprisonment was bad in law. The learned Counsel submitted that the Applications at Exh.4 and Exh.6 filed by the Petitioner in Application No.38 of 2003 ought to have been allowed. The learned Counsel pointed out that out of sum of Rs.26,800/- referred to in order dated 18th December, 2002, a sum of Rs.19,800/- has been

paid by the Petitioner. The learned Counsel appearing for the Respondent No.1 submitted that no indulgence should be shown to the Petitioner and this Petition should not be entertained.

6. I have considered the rival submissions. The order dated 18th December, 2002 is passed on the account of default committed by the Petitioner as of that date. The default was to the extent of non-payment of Rs.26,800/-. There is a statement on oath of the Petitioner that he has paid sum of Rs.19,800/- out of the said amount.

7. It appears from the record that notice of the recovery application was served on the Petitioner. He made no efforts to appear before the court and to establish that he has no means to pay. As the Petitioner has not raised the contention that he has no means to pay, now the Counsel appearing for the Petitioner cannot rely upon a panchnama which is drawn at the time of effecting attachment and say that the Petitioner has no means to pay. That case ought to have been made out in the recovery application. Therefore, there is no merit in the said contention.

8. The averments in the Petition and the

averments made in the Application No.38 of 2003 filed by the Petitioner show that on the basis of the order dated 18th December, 2002 the Petitioner has undergone some sentence. As stated earlier the Petitoner has stated on oath that a sum of Rs.19,800/- has been paid by the Petitioner. The order dated 18th December, 2002 therefore, needs modification only to the extent that the sentence awarded will be reduced to one which is already undergone by the Petitioner.

9. So far as the challenge to order passed below Exh.4 and Exh.6 is concerned, the order is purely interlocutory order. The main Application for veriation under section 127 of the said Code is still pending and therefore, in Writ Jurisdiction under Article 227 of the Constitution of India, no interference can be made with the order dated 28th October, 2003. Hence, I pass the following order:

: O R D E R :

i) The order dated 28th October, 2003 is confirmed.

ii) The order dated 18th December, 2002 passed in maintenance recovery application No.1260 of 2000 is

modified to the extent that the sentence awarded is reduced to the sentence which is already undergone by the Petitioner.

iii) All questions between the parties on merits of Application No.38 of 2003 filed by the Petitioner are kept open.

iv) Rule is made partly absolute in above terms.

v) Parties to act upon an authenticated copy of this order.

JUDGE